

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
April 29, 2009 Session

JEFFERY S. GORDON v. STATE OF TENNESSEE

**Appeal from the Criminal Court for Claiborne County
No. 13,366 E. Shayne Sexton, Judge**

No. E2008-01767-CCA-R3-PC - Filed November 2, 2009

The petitioner, Jeffrey S. Gordon, appeals as of right from the Claiborne County Criminal Court's denial of his petition for post-conviction relief. The petitioner entered guilty pleas to two counts of kidnapping, three counts of aggravated assault, and one count of misdemeanor harassment and received an effective sentence of thirty years as a Range I, standard offender. His timely filed petition for post-conviction relief alleged that his guilty pleas were unknowingly and involuntarily entered as the result of the ineffective assistance of counsel. Following an evidentiary hearing, the post-conviction court denied relief. Following our review, we affirm the judgment of the post-conviction court.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court is Affirmed.

D. KELLY THOMAS, JR., J., delivered the opinion of the court, in which JOSEPH M. TIPTON, P.J., and NORMA MCGEE OGLE, J., joined.

Thomas J. Tabor, Jr., Tazewell, Tennessee, attorney for appellant, Jeffrey S. Gordon.

Robert E. Cooper, Jr., Attorney General and Reporter; Sophia S. Lee, Assistant Attorney General; William Paul Phillips, District Attorney General; Jared R. Effler and Amanda Sammons, Assistant District Attorneys General, attorneys for appellee, State of Tennessee.

OPINION

The petitioner's convictions arose from the defendant's kidnapping at gunpoint a newlywed couple in Cumberland Gap in order to travel throughout Claiborne County to see his young daughter. Initially indicted for two counts of especially aggravated kidnapping related to the newlyweds, three counts of aggravated assault related to other victims, and one count of harassment, the petitioner pled guilty pursuant to a plea agreement to the reduced charges of two counts of kidnapping, three counts of aggravated assault and one count of harassment. On the morning of the guilty plea submission, the petitioner indicated some displeasure with trial counsel's performance and indicated a desire to hire new counsel. However, when instructed by the trial court that there would be no continuance of the trial date scheduled for two days later, the petitioner elected to enter into the plea agreement

later that day. The petitioner filed a timely petition for post-conviction relief alleging that trial counsel was ineffective in failing to investigate his case or prepare for trial and that trial counsel pressured him into accepting the plea agreement, rendering his guilty pleas unknowing and involuntary.

Trial counsel testified at the evidentiary hearing that he represented the petitioner from his arraignment in General Sessions Court throughout the nine months leading up to the guilty plea. Although he stated that he could not say “with any precision” how many hours he had spent consulting with the petitioner, he testified that the time exceeded the thirty minutes alleged by the petitioner in his post-conviction petition. Trial counsel denied that he “pushed” the petitioner for a plea without properly investigating the case first. He did recall that the petitioner never denied committing the offenses but that the petitioner never thought the victims would appear to prosecute the case. Trial counsel also recalled that the petitioner was dissatisfied with news that the victims intended to move forward with the prosecution and that he was also dissatisfied with the plea offers by the State. Although trial counsel had concerns about the petitioner’s mental state, an evaluation performed on the petitioner concluded that he was competent to stand trial. In light of the petitioner’s mental competency and admission to the offenses, trial counsel stated that the entire strategy was to mitigate the petitioner’s punishment as best he could. For these reasons, trial counsel recommended that the petitioner accept the plea offer of thirty years at thirty percent. Trial counsel recalled that the State initially offered the petitioner fifteen years at one hundred percent if he would plead to the indictment, but later offered the more favorable release eligibility to which the petitioner ultimately pled.

The petitioner testified that his main complaint with trial counsel was the lack of communication leading up to his trial date. He stated that he was prepared to hire another attorney although he was unable to identify the attorney that was his intended choice when testifying at the evidentiary hearing. He described the events of the morning of his guilty pleas and recalled that he was very fearful when brought before the trial court to discuss hiring a new lawyer. He indicated that he was “scared to death.” After the trial court made clear to him that he would not receive a continuance of the trial date, the petitioner decided to accept the plea offer. He testified that he believed, however, that he would only have to serve approximately nine years before release but found out that it would be closer to twenty years once he arrived at the prison. The petitioner acknowledged that he never denied committing the offenses. He also stated that he did not believe the victims would appear to prosecute the case but admitted that they were present on the day of his guilty pleas. Regarding his specific responses to the trial court’s colloquy, the petitioner affirmed that he never indicated a problem with his understanding of the terms of the plea agreement or any problems with trial counsel’s representation, but the petitioner claimed he only answered the questions in that manner “out of fear.”

At the conclusion of the evidentiary hearing, the post-conviction court found that there was no evidence that the petitioner was forced into his guilty pleas. The post-conviction court further found that the colloquy adequately reflected that the petitioner voluntarily, knowingly, and understandingly entered his guilty pleas. The court specifically found that there was no showing of deficient performance and that many of the petitioner’s allegations regarding the time trial counsel dedicated to his case simply lacked credibility. The court also found that the petitioner never denied

committing the offenses and that the plea agreement resulted in a reduction of the kidnapping charges and more favorable sentencing classification than the petitioner would have received had he proceeded to trial and been convicted of the indicted offenses. Based upon these findings, the post-conviction court denied the petition for post-conviction relief.

ANALYSIS

The burden in a post-conviction proceeding is on the petitioner to prove the factual allegation to support his grounds for relief by clear and convincing evidence. Tenn. Code Ann. § 40-30-110(f). On appeal, we are bound by the trial court's findings of fact unless we conclude that the evidence in the record preponderates against those findings. Fields v. State, 40 S.W.3d 450, 456 (Tenn. 2001). Because they relate to mixed questions of law and fact, we review the trial court's conclusions as to whether counsel's performance was deficient and whether that deficiency was prejudicial under a de novo standard with no presumption of correctness. Id. at 457.

Under the Sixth Amendment to the United States Constitution, when a claim of ineffective assistance of counsel is made, the burden is on the petitioner to show (1) that counsel's performance was deficient and (2) that the deficiency was prejudicial. Strickland v. Washington, 466 U.S. 668, 687 (1984); see Lockhart v. Fretwell, 506 U.S. 364, 368-372 (1993). In other words, a showing that counsel's performance falls below a reasonable standard is not enough; rather, the petitioner must also show that but for the substandard performance, "the result of the proceeding would have been different." Strickland, 466 U.S. at 694. The Strickland standard has been applied to the right to counsel under article I, section 9 of the Tennessee Constitution. State v. Melson, 772 S.W.2d 417, 419 n.2 (Tenn. 1989). In the context of a guilty plea as in this case, the effective assistance of counsel is relevant only to the extent that it affects the voluntariness of the plea. Therefore, to satisfy the second prong of Strickland, the petitioner must show that "there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." Hill v. Lockhart, 474 U.S. 52, 59 (1985); see also Walton v. State, 966 S.W.2d 54, 55 (Tenn. Crim. App. 1997).

The petitioner contends that the post-conviction court erred in finding that his guilty pleas were voluntary, that trial counsel was not deficient, and that he was not denied his right to represent himself at trial. Relative to the first two allegations, we agree with the post-conviction court that the petitioner failed to present sufficient evidence of any deficient performance by trial counsel; therefore, there is also no evidence of any prejudice flowing from counsel's performance. Similarly, the record in this case refutes the petitioner's claim that his guilty pleas were involuntary. Instead, the record reflects that the petitioner understandingly, knowingly, and voluntarily agreed to a plea arrangement that would result in a more beneficial release eligibility. The petitioner has never denied committing the offenses as indicted. Under these circumstances, we cannot conclude that the post-conviction court erred in denying his petition for post-conviction relief.

Regarding his allegation on appeal that he was denied the right to represent himself at trial, the record reflects that the petitioner requested leave to hire his own attorney just two days before his scheduled trial date. When informed by the trial court that hiring new counsel would not result in a continuance of the trial date, the petitioner briefly and equivocally remarked that he could represent himself better than he felt trial counsel was representing him. The trial court cautioned the petitioner against self-representation, referring to it as a “foolhardy” endeavor. The record reflects that the petitioner did not persist in any desire to represent himself. The guilty plea colloquy reflects that the petitioner was satisfied with counsel’s performance. The record reflects that the guilty plea were voluntarily, knowingly, and understandingly entered. Under these circumstances, we cannot conclude that the petitioner’s right to self-representation was violated prior to the entry of his guilty plea.

CONCLUSION

Based upon the foregoing, the judgment of the post-conviction court is affirmed.

D. KELLY THOMAS, JR., JUDGE